

BURSOR & FISHER, P.A.

Scott A. Bursor (State Bar No. 276006)
L. Timothy Fisher (State Bar No. 191626)
Yeremey O. Krivoshey (State Bar No. 295032)
1990 North California Blvd., Suite 940
Walnut Creek, CA 94596
Telephone: (925) 300-4455
Facsimile: (925) 407-2700
E-mail: scott@bursor.com
ltfisher@bursor.com
ykrivoshey@bursor.com

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MALIK BROWN, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

DIRECTV, LLC,

Defendant.

Case No. 5:16-cv-00263-DMG-(Ex)

**PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Date: October 26, 2018

Time: 3:00 p.m.

Courtroom: 8C

The Honorable Dolly M. Gee

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I. INTRODUCTION

Defendant's motion seeks to greatly limit the scope of prior express consent needed to call third parties using an autodialer and prerecorded messages. Under Defendant's argument, simply calling a third party gives such third party consent to call using an autodialer, as the act of calling purportedly "releases" a number out into the world. This is not a close issue. The FCC has issued rulemaking stating that "if a caller's number is 'captured' by a Caller ID or an ANI device without notice to the residential telephone subscriber, the caller cannot be considered to have given an invitation or permission to receive autodialer or prerecorded voice message calls." *In the Matter of Rules & Reg's Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C.R. 8752, 8769 ¶ 31 (1992) (the "1992 FCC Order"). Otherwise, any person who has ever dialed anyone else will have deemed to have consented to receive autodialed and prerecorded message calls on their cellphones, precisely the problem the Congress sought to curtail in enacting the TCPA. It is undisputed that Plaintiff never received notice on any purported calls with DIRECTV that his number would be stored in any way, or used for automated service calls. Thus, whether or not Plaintiff may or may not have called DIRECTV to complain about a "snowy" screen or complain about service is wholly irrelevant. Accordingly, Defendant's motion should be denied, and the Court should find as a matter of law that Defendant lacked prior express consent to call Plaintiff.

II. FACTUAL BACKGROUND

A. DIRECTV Does Not Obtain Consent From Authorized Users Or Third Parties Whose Numbers May Be Provided For Service Calls

A DIRECTV account holder has the responsibility for creating a DIRECTV account, adding any "authorized users" on an account, and providing all of the relevant information regarding the account. Krivoshey Decl., Ex. [] ("Dunleavy Dep."), at 28:7-29:8, 36:13-15 ("Q. Can someone that's not the account holder add

1 themselves as an authorized user” A. No.”). DIRECTV has no process of verifying
 2 the correctness or ownership of the phone numbers provided to it by account holders
 3 with respect to the account holders’ telephone numbers or the telephone numbers of
 4 any added authorized users. *Id.* Thus, an account holder can add another as an
 5 “authorized user” and give their number to DIRECTV without the “authorized user”
 6 having any knowledge of the event.

7 When there is a maintenance, installation, or other service visit, DIRECTV
 8 does not obtain consent to call a third party’s number that may have been provided
 9 prior to making automated and prerecorded calls to such numbers. *See id.*, at 30:6-
 10 35:20. Instead, account holders can provide contact numbers of third parties
 11 regarding a specific service visit, such as, for example, the number of a tenant who
 12 can let DIRECTV’s employees inside to make a necessary installation or upgrade.
 13 *Id.*, at 30:4-33:14. In that situation, DIRECTV’s first contact with the tenant or other
 14 third party is an automated, prerecorded call sent shortly before the service visit. *Id.*
 15 Only after such automated calls are made, DIRECTV may also contact the third
 16 party via a live call from a DIRECTV employee to confirm the reservation. *See id.*
 17 Neither the account holder, the authorized user, or any other third party whose
 18 numbers may have been provided to DIRECTV are given an opportunity to “opt-in”
 19 to receive these prerecorded calls regarding an installation or service event. *See id.*,
 20 at 33:15-35:11.

21 **B. The [REDACTED] Account**

22 Mr. [REDACTED] was Plaintiff’s landlord for a period of time in 2015. Plaintiff’s
 23 Statement of Genuine Disputes of Material Fact (“SGD”), ¶ 27. Mr. [REDACTED]
 24 already had DIRECTV by the time Plaintiff moved into the [REDACTED] residence. *Id.*,
 25 ¶ 37. Plaintiff is not an authorized user on the [REDACTED] account. *Id.* ¶ 38.
 26 Plaintiff’s name has never been listed anywhere on the [REDACTED] account, Plaintiff
 27 never received bills regarding the [REDACTED] account, and Plaintiff did not make any
 28

1 payments with respect to the [REDACTED] account. *Id.* Plaintiff is not aware of Mr.
 2 [REDACTED] ever listed him or his 6166 number as a contact or reference for any service
 3 appointment, deliveries, or installations. *Id.* ¶ 36. Plaintiff has not told anyone or
 4 authorized anyone to list his cellular telephone number as an emergency contact or a
 5 contact for deliveries, services, or installation on the [REDACTED] (or any other)
 6 account:

7
 8 Q. Have you told any friends or neighbors that they can list your telephone
 9 number as, like, an emergency contact or a contact for deliveries or a
 contact for anything like that?

10 A. No.

11 *Krivoshey Decl., Ex. 2 ("Brown Dep."), at 48:11-15; SGD ¶ 36.*

12 Q. When you lived with Mr. [REDACTED], if he had deliveries or if he had a
 13 satellite installation or if he had other people that were at the house
 coming to the house, would he have them contact you sometimes?

14 A. Oh, no.

15 Q. You wouldn't ever have him call you to get in the door or anything like
 16 that"

17 A. No, not that I recall.

18 Q. You don't recall or he wouldn't do it?

19 A. Let me hear the question again, please.

20 Q. When you lived with Mr. [REDACTED], would he ever have you handle
 21 deliveries or installation or people that would come by the house and
 22 have them contact you to get in the house?

23 A. No. It's not like that, no.

24 *Id.*, at 54:1-16; SGD ¶ 35.

25 Neither Plaintiff's name nor his 6166 number are listed as a contact number
 26 anywhere on the [REDACTED] account. *See id.* ¶ 39. DIRECTV is not in possession of
 27 a single document linking the 6166 number to Malik Brown's name in its records.
 28 SGD ¶ 54. DIRECTV has no documentation of the 6166 number ever being

1 provided as a contact point for any equipment upgrade or service transaction,
2 including a December 30, 2015 service upgrade on the [REDACTED] account. SGD ¶ 42.
3 DIRECTV's Fed. R. Civ. P. 30(b)(6) witness and DIRECTV's counsel admitted as
4 such when asked about outbound automated call logs made to Plaintiff's 6166
5 number:

6 Q. Do you have the document?

7 A. I have the document.

8 Q. Have you seen it before?

9 A. I have seen it before.

10 Q. What is it?

11 A. This is a very simple summary of automated outbound communications
12 from AT&T to a customer or designated contact point, in this case,
13 related to a maintenance or service event. And from recollection, these
14 outbound calls relate to two accounts: the first line being the [REDACTED]
15 account, and the next four being the [REDACTED] account.

16 Q. How do you know that – so, the first line – by “the first line,” you’re
17 referring to an entry of December 29, 2015; is that correct?

18 A. Correct.

19 Q. And how do you know that, that refers to the [REDACTED] account?

20 A. There were maintenance and upgrade transactions ordered by [REDACTED]
21 [REDACTED] around this time, and the 6166 number was provided as a
22 contact point for the tech during the equipment upgrade.

23 Q. Have we seen in a document where the 6166 number was provided
24 to the tech?

25 A. We have not reviewed that today.

26 Q. Does that document exist?

27 A. I cannot recall – yeah, I can't recall exactly.

28 Q. So, how do you know about it?

1 A. I believe in the fairly extensive set of documents that I've reviewed, that
2 I have seen it; but I don't have it to hand.

3 MR. KRIVOSHEY: Counsel, do you know if it was produced?

4 MR. STEINMETZ: Are you talking about –

5 MR. KRIVOSHEY: Or what he's talking about?

6 MR. STEINMETZ: Are you talking about the policy documents?

7 THE WITNESS: Well, it will be in the policy documents; **but, no, I'm**
8 **talking about the specific capture of the 6166 number related to the**
9 **maintenance action on the [REDACTED] account.**

10 MR. STEINMETZ: **I don't believe that there's a document for that.**

11 THE WITNESS: **Right.**

12 Q. Okay. So, if there is – I'm going to take counsel's word that there is no
13 document. Your only basis for thinking that this is the [REDACTED]
14 account is the timing of the call?

15 A. Correct.

16 Dunleavy Dep., at 115:15-117:23 (emphasis added); SGD ¶ 42.

17 All services, installation, and upgrades regarding the Koromah account were
18 approved by Mr. [REDACTED], not Plaintiff, including a December 30, 2015 installation.
19 See SGD ¶ 40. Neither Plaintiff's name nor his 6166 number are listed anywhere on
20 the December 30, 2015 work order on the [REDACTED] account. *Id.* ¶ 41.

21 DIRECTV's only evidence of any contact between Plaintiff and DIRECTV
22 regarding the [REDACTED] account are call logs showing 10 calls coming from
23 Plaintiff's 6166 number. See SGD ¶ 29. DIRECTV employees are trained to always
24 ask callers to identify themselves, and are trained to record the identity of the person
25 they are speaking with in contemporaneous notes. *Id.* ¶ 43. DIRECTV's
26 contemporaneous account notes do not show a single instance of a person calling in
27 regarding the [REDACTED] account and identifying themselves as Malik Brown. *Id.* ¶
28 44. On all calls regarding Mr. [REDACTED] account, the caller identified themselves

1 as [REDACTED] (the account holder) or his spouse [REDACTED] with the exception of
2 one call on September 2, 2015, where the caller identified themselves as Mr.
3 [REDACTED] son. *Id.* ¶ 45. Mr. Brown's only recollection of potential calls he may
4 have made to DIRECTV was to call regarding a complaint. *See* Brown Dep., at
5 51:4-25.

6 At no time during any of the calls from the 6166 number to DIRECTV on
7 either the [REDACTED] or [REDACTED] account did DIRECTV, or any of its employees,
8 notify the person calling that the number from which they were dialing would be
9 used for contact purposes or stored by DIRECTV for any purpose. *Id.* ¶ 47.

10 C. The [REDACTED] Account

11 For a time, Plaintiff lived in Temple City, the same city where Ms. [REDACTED]
12 apparently resides and had a DIRECTV subscription. Brown Dep., at 55:14-25. At
13 his deposition, however, Plaintiff could not recall the name [REDACTED]. *Id.*, at
14 55:5-10. Plaintiff does not recall using DIRECTV services while living in Temple
15 City. *Id.*, at 56:8-12.

16 Unbeknownst to Plaintiff, he apparently was listed as an authorized user on
17 the [REDACTED] account. *See* SGD ¶ 17. His number was also listed as a contact number.
18 *Id.* ¶ 18. DIRECTV cannot say when Malik Brown was added as an authorized user
19 on [REDACTED] account. SGD ¶ 51. Plaintiff is not the primary contact listed on the
20 [REDACTED] account. SGD ¶ 52. Plaintiff never listed himself as an authorized user on
21 any DIRECTV account, including the [REDACTED] account. SGD ¶ 55, Brown Dep., at
22 57:17-58:13. DIRECTV does not know who added the 6166 number to [REDACTED]
23 account, and admits it could have been [REDACTED] not Plaintiff, that added the number.
24 SGD ¶ 50. In fact, as a non-account holder, it must have been [REDACTED], and not
25 Plaintiff, that added Plaintiff as an authorized user. *See* Dunleavy Dep., at 36:13-15
26 ("Q. Can someone that's not the account holder add themselves as an authorized
27 user" A. No.).
28

1 Plaintiff has not told anyone or authorized anyone to list his cellular telephone
2 number as an emergency contact or a contact for deliveries, services, or installation
3 on the [REDACTED] (or any other) account. SGD ¶ 36.

4 There is only one inbound call made from the 6166 number on the [REDACTED]
5 account, dated May 31, 2014, but that call resulted in an entry of “WRONG
6 ACCOUNT” by DIRECTV’s employee that answered the call. SGD ¶ 53. No other
7 inbound calls from the 6166 number were ever made regarding the [REDACTED] account.
8 *Id.*

9 DIRECTV’s call logs shows that on June 26, 2015, Plaintiff may have called
10 DIRECTV regarding the [REDACTED] account to complain about a snowy screen. SGD ¶
11 24. However, this call was not made from Plaintiff’s 6166 number. *Id.* Rather, the
12 call was made from a number ending in 6550, the primary number associated with
13 the [REDACTED] account. *Id.*

14 III. LEGAL STANDARD

15 Under the TCPA, “[e]xpress consent is not an element of a plaintiff’s prima
16 facie case but is an affirmative defense for which the defendant bears the burden of
17 proof.” *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1044 (9th Cir.
18 2017). Here, the only element at issue is whether or not Plaintiff provided
19 DIRECTV with consent to make autodialed and prerecorded calls to his 6166
20 number – an element that Defendant will have to prove at trial. “Where, as here, the
21 *moving party* bears the burden of proof at trial, it must come forward with evidence
22 which would entitle it to a directed verdict if the evidence went uncontroverted at
23 trial.” *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992) (emphasis in
24 original). Defendant thus bears the initial burden of establishing the absence of a
25 genuine issue of fact on the issue of consent. *See id.* Only if Defendant meets this
26 initial burden, the burden shifts to Plaintiff to designate specific facts showing that
27 there is a genuine issue. *See id.* See also *Chanel, Inc. v. Italian Activewear of*
28

1 *Florida, Inc.*, 931 F.2d 1472, 1477 (11th Cir.1991) (“But—particularly where, as
 2 here, the moving party is also the party with the burden of proof on the issue—it is
 3 important to remember the non-moving party must produce its significant, probative
 4 evidence only after the movant has satisfied its burden of demonstrating there is no
 5 genuine issue of material fact.”). A dispute is genuine “if the evidence is such that a
 6 reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty*
 7 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). “[T]he inferences to be drawn from the
 8 underlying facts ... must be viewed in the light most favorable to the party opposing
 9 the motion.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-
 10 88 (1986) (quotations omitted).

11 IV. ARGUMENT

12 A. Defendant Has Failed To Meet [REDACTED] To Prove 13 Consent To Receive Calls On [REDACTED] Account

14 Defendant’s only “evidence” of Plaintiff’s purported consent to receive calls
 15 on the [REDACTED] account is the fact that DIRECTV’s call logs show 10 incoming
 16 calls from Plaintiff’s 6166 number regarding the [REDACTED] account. *See* Def’s Br. at
 17 12. Notably, Defendant does not argue that Plaintiff actually provided his telephone
 18 number to DIRECTV on those calls – such as, by verbally stating his telephone
 19 number or telling DIRECTV that they can call him at that number. Rather,
 20 DIRECTV argues that the fact that Plaintiff allegedly made these calls at all, and that
 21 DIRECTV’s Caller-ID system recorded the phone number from which the calls
 22 originated, is sufficient evidence of consent. *See id.*

23 Although it is disputed whether or not Plaintiff actually made these calls, the
 24 issue is irrelevant. As a matter of law, a person does not provide consent to be called
 25 for purposes of the TCPA, or “releas[e] his number to be called,” simply by calling a
 26 company and having his number recorded by the company’s Caller-ID.

27 In a 1992 rulemaking action implementing the TCPA, the FCC ruled that
 28 “persons who knowingly release their phone numbers have in effect given their

1 invitation or permission to be called at the number which they have given, absent
 2 instructions to the contrary.” 1992 FCC Order. However, the 1992 FCC Order
 3 clarified:

4 [I]f a caller’s number is “captured” by a Caller ID or an ANI device without
 5 notice to the residential telephone subscriber, the caller cannot be considered
 6 to have given an invitation or permission to receive autodialer or prerecorded
 7 voice message calls. There, calls may be placed to “captured” numbers only if
 8 such calls fall under the existing exemptions to the restrictions on autodialer
 9 and prerecorded message calls.

10 *Baird v. Sabre, Inc.*, 995 F. Supp. 2d 1100, 1105-06 (C.D. Cal. 2014) (quoting 1992
 11 FCC Order). The Court is bound the FCC’s interpretation by the Hobbs
 12 Administrative Orders Review Act, 28 U.S.C.A. § 2342(1) and does not have
 13 jurisdiction to set it aside. *See Sherman v. Yahoo! Inc.*, 150 F. Supp. 3d 1213, 1216
 14 (S.D. Cal. 2015); *Cartrette v. Time Warner Cable, Inc.*, 157 F. Supp. 3d 448, 453
 15 (E.D.N.C. 2016) (“Therefore, regardless of whether this FCC interpretation of the
 16 TCPA is entitled to Chevron deference, this Court lacks jurisdiction to review its
 17 validity.”). Accordingly, as other courts have held when faced with similar facts,
 18 Defendant’s argument that Plaintiff consented or “released his number” by virtue of
 19 calling DIRECTV must fail. *See Castro v. Green Tree Servicing LLC*, 959 F. Supp.
 20 2d 698, 721 (S.D.N.Y. 2013) (“The FCC has noted, however, that if a caller’s
 21 number is ‘captured’ by a Caller ID without notice to the caller, the caller cannot be
 22 considered to have given an invitation or permission to receive autodialer or
 23 prerecorded voice message calls. Accordingly, Defendants’ argument that Plaintiffs
 24 ‘consented’ to the calls at issue by initiating calls to Defendants using their cell
 25 phones must fail.”) (quotations and citations omitted); *Levy v. Receivables*
 26 *Performance Mgmt., LLC*, 972 F. Supp. 2d 409, 422–23 (E.D.N.Y. 2013) (denying
 27 motion for summary judgment on issue of consent where defendant argued “that
 28 plaintiff provided prior express consent by initiating calls to RPM and/or discussing
 his financial information and a potential settlement of the debt dispute with

1 representative of RPM”); *Modica v. Green Tree Servicing, LLC*, 2015 WL 1943222,
 2 at *4 (N.D. Ill. Apr. 29, 2015) (granting summary judgment in favor of plaintiff
 3 where “Defendant obtained her number when she made an inbound call to complain
 4 about Defendant calling her neighbors regarding the subject debt.”).

5 None of the cases Defendant cites suggest a different result, as the provision of
 6 a number by the plaintiffs in those cases was typically in a credit or membership
 7 application where the plaintiffs *had to actually write their number down or enter it*
 8 *online*. See, e.g., *Van Patten*, 847 F. 3d at 1040 (plaintiff wrote down his contact
 9 information on a “desk courtesy card to the gym”); *Reardon v. Uber Techs., Inc.*, 115
 10 F. Supp. 3d 1090, 1097 (N.D. Cal. 2015) (“Plaintiffs do not dispute that they provide
 11 their phone numbers to Uber”); *Fober v. Mgmt. & Tech. Consultants, LLC*, 2016 WL
 12 7626431, at *1 (C.D. Cal. July 29, 2016) (“At the time of her enrollment, she
 13 submitted an Enrollment Form, which included – among other things – her telephone
 14 number.”); *Baird v. Sabre Inc.*, 995 F. Supp. 2d 1100, 1101 (C.D. Cal. 2014)
 15 (plaintiff entered her cellphone number in the “Contact Information” section of
 16 defendant’s website).

17 Defendant’s only cited case that is remotely close to the facts here is *Emanuel*
 18 *v. Los Angeles Lakers, Inc.*, 2013 WL 1719035 (C.D. Cal. Apr. 18, 2013), where the
 19 plaintiff sent a text message to the Lakers to have a message displayed on the
 20 scoreboard during a game. The plaintiff then received a confirmatory text back.
 21 Judge Wu held that the plaintiff consented to the confirmatory text message as any
 22 reasonable person would expect a text message response, and, accordingly,
 23 consented to the confirmatory response. *Emanuel*, 2013 WL 1719035, at *3. That is
 24 not the case here. Here, even assuming that Plaintiff made calls to DIRECTV to
 25 complain about his service, a reasonable person would not expect to receive
 26 automated and prerecorded messages just by virtue of calling. In any case, to the
 27
 28

1 extent that *Emanuel* is inconsistent with the 1992 FCC Order, the FCC Order
2 controls.

3 **B. Defendant Has Failed To Meet [REDACTED] en To Prove**
4 **Consent To Receive Calls On [REDACTED] Account**

5 Defendant's only evidence of Plaintiff's consent to receive automated calls on
6 his cellphone regarding the [REDACTED] account is the fact that his number was listed as a
7 contact number on the account and he was listed as an authorized user. *See* Def's Br.
8 at 8-9. However, Defendant admits that [REDACTED], and not Plaintiff added his number
9 and his name as an authorized user on the account. SGD ¶ 49. Plaintiff never listed
10 himself as an authorized user on this, or any other, DIRECTV account. *Id.* ¶ 55.
11 Plaintiff made only one phone call regarding the [REDACTED] account, but that call was
12 not made from his 6166 number, and, accordingly, that call cannot be evidence of
13 consent to receive calls on his 6166 number. *Id.* ¶ 24, 53.

14 "The TCPA states that it shall be unlawful to make any call using an
15 autodialer or an artificial or prerecorded voice, absent certain exceptions, without the
16 prior express consent of the called party." *In the Matter of Rules & Regulations*
17 *Implementing the TCPA*, 30 F.C.C. Rcd. 7961, 2015 FCC Order, 2015 WL 4387780,
18 at *26 (2015) ("2015 FCC Order"). "[T]he 'called party' is the subscriber, *i.e.*, the
19 consumer assigned the telephone number dialed and billed for the call, or the non-
20 subscriber customary user of a telephone number included in a family or business
21 plan." *Id.* Thus, under the TCPA, a person cannot provide express consent on behalf
22 of a third party. *See, e.g., Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 641
23 (7th Cir. 2012) (noting that a creditor would not have consent to call a number given
24 by a customer where the number was not the customer's own number, such as via
25 typo, or where the number was later reassigned). *See also Abrantes v. Northland*
26 *Grp., Inc.*, 2015 WL 1738255, at *3 (N.D. Cal. Apr. 13, 2015) (the definition of
27 "called party," for purposes of consent, means the current subscriber, and not the
28 intended recipient). Accordingly, because the evidence is undisputed that [REDACTED]

1 and not Plaintiff, created the account, added him as an authorized user, and added his
 2 telephone number, Defendant's motion should be denied. Plaintiff never listed
 3 himself as an authorized user on any account, and did not authorize anyone else to do
 4 so. SGD ¶¶ 35-36, 55.

5 **C. Calls Predating December 2015**

6 Defendant argues that Plaintiff waived his claims as to any calls predating
 7 December 2015 because the deadline to amend pleadings has passed, limiting the
 8 calls at issue to one call on December 29, 2015. As an initial matter, Plaintiff alleges
 9 that he received calls from DIRECTV from more than one number, putting
 10 Defendant on notice that more than one call was at issue. Compl. ¶ 13. Further, at
 11 the parties' April 27, 2018 scheduling conference, the Court explicitly stated that it
 12 was setting only deadlines relating to the present motion for summary judgment, and
 13 put off setting any other deadlines. Krivoshey Decl., Ex. 10, at 21:5-8 ("Well, I want
 14 to have the issue of prior consent decided upfront. And so I'm going to tee that up so
 15 that we do that before we set up any other further deadlines."). Should the Court
 16 believe that calls predating December 2015 fall outside the pleadings, Plaintiff asks
 17 that the Court grant leave to file an amended complaint to include allegations
 18 regarding the calls predating December of 2015.

19 **V. CONCLUSION**

20 For the foregoing reasons, Defendant's motion should be denied. Further,
 21 should the Court find that these facts do not constitute consent as a matter of law,
 22 Plaintiff requests that the Court find that he did not provide consent as a matter of
 23 law with respect to any DIRECTV account.

24
 25
 26 Dated:

BURSOR & FISHER, P.A.

27 By: /s/ Yeremey Krivoshey
 28 Yeremey Krivoshey

1
2 Scott A. Bursor (State Bar No. 276006)
3 L. Timothy Fisher (State Bar No. 191626)
4 Yeremey O. Krivoshey (State Bar No. 295032)
5 1990 North California Blvd., Suite 940
6 Walnut Creek, CA 94596
7 Telephone: (925) 300-4455
8 Facsimile: (925) 407-2700
9 E-mail: scott@bursor.com
10 ltfisher@bursor.com
11 ykrivoshey@bursor.com

12 *Attorneys for Plaintiff*